



**Financial Services
Commission**

Information page

Alternative Investment Fund Managers Directive Depositaries

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Any advice or interpretation covered in this information page represents the views of the FSC as to its expectations of how the requirements of the AIFMD are to be complied with and/or how it fails to be applied. This however is not intended as a definitive interpretation of the AIFMD which is ultimately a matter for the courts to determine. The FSC does not provide, or purport to offer, legal advice.



1. Introduction

- 1.1 The content of this information page is applicable only to AIFMs which are within the scope of AIFMD. Before reading this document it is highly recommended to read the FSC information pages on “AIFMD – Overview” and “AIFMD – Small AIFMs”.
- 1.2 The depository is the key independent party in AIFMD and is charged with protecting the investors in each AIF. The depository has three major roles:
 - (a) to safe keep assets,
 - (b) monitor cash, and
 - (c) oversee NAV calculation and fund administration.
- 1.3 The purpose of this information page is to provide depositories with information on the requirements.
- 1.4 In this information page, reference is made to the Alternative Investment Fund Managers Directive 2011/61/EU (“AIFMD”) and to the supplementing Level 2 Delegated Regulation (“Level 2”).
- 1.5 The provisions of the AIFMD relating to the appointment and the tasks of a depository applies to all AIFs managed by an AIFM and therefore to all AIF business models. They should, however, be adapted to the specificities of different business models. For some business models, certain depository tasks are more relevant than others depending on the type of assets the AIFs are investing in and the tasks related to those assets.

2. Appointment of depository

- 2.1 AIFMs must ensure that a single depository is appointed for each AIF it manages. The appointment must be evidenced by a written contract between the depository and either the AIFM and, as the case may be, or the AIF and must include at least the following elements:
 - (a) a description of the services to be provided by the depository and the procedures to be adopted for each type of asset in which the AIF may invest and which shall then be entrusted to the depository;
 - (b) a description of the way in which the safe-keeping and oversight function is to be performed depending on the types of assets and the geographical regions in which the AIF plans to invest. With respect to the custody duties this description shall include country lists and procedures for adding and, as the case may be, or withdrawing countries from that list. This shall be consistent with the information provided in the AIF rules, instruments of incorporation and offering documents regarding the assets in which the AIF may invest;
 - (c) a statement that the depository's liability shall not be affected by any delegation of its custody functions unless it has discharged itself of its liability in accordance with sections 13.1 and 13.2 below;
 - (d) the period of validity and the conditions for amendment and termination of the contract including the situations which could lead to the termination of the contract and details regarding the termination procedure and, if applicable, the procedures by which the depository should send all relevant information to its successor;



- (e) the confidentiality obligations applicable to the parties in accordance with relevant laws and regulations. These obligations shall not impair the ability of competent authorities to have access to the relevant documents and information;
- (f) the means and procedures by which the depositary transmits to the AIFM or the AIF all relevant information that it needs to perform its duties including the exercise of any rights attached to assets, and in order to allow the AIFM and the AIF to have a timely and accurate overview of the accounts of the AIF;
- (g) the means and procedures by which the AIFM or the AIF transmits all relevant information or ensures the depositary has access to all the information it needs to fulfil its duties, including the procedures ensuring that the depositary will receive information from other parties appointed by the AIF or the AIFM;
- (h) information on whether or not the depositary, or a third party to whom safekeeping functions are delegated in accordance with sections 11.1 to 11.4 below may re-use the assets it has been entrusted with and, if any, the conditions attached to any such re-use;
- (i) the procedures to be followed when an amendment to the AIF rules, instruments of incorporation or offering documents is being considered, detailing the situations in which the depositary is to be informed, or where the prior agreement of the depositary is needed to proceed with the amendment;
- (j) all necessary information that needs to be exchanged between the AIF, the AIFM, a third party acting on behalf of the AIF or the AIFM, on the one hand, and the depositary, on the other hand, related to the sale, subscription, redemption, issue, cancellation and re-purchase of units or shares of the AIF;
- (k) all necessary information that needs to be exchanged between the AIF, the AIFM, a third party acting on behalf of the AIF or the AIFM and the depositary related to the performance of the depositary's oversight and control function;
- (l) where the parties to the contract envisage appointing third parties to carry out parts of their respective duties, a commitment to provide, on a regular basis, details of any third party appointed and, upon request, information on the criteria used to select the third party and the steps envisaged to monitor the activities carried out by the selected third party;
- (m) information on the tasks and responsibilities of the parties to the contract in respect of obligations relating to the prevention of money laundering and the financing of terrorism;
- (n) information on all cash accounts opened in the name of the AIF or in the name of the AIFM acting on behalf of the AIF and the procedures ensuring that the depositary will be informed when any new account is opened in the name of the AIF or in the name of the AIFM acting on behalf of the AIF;
- (o) details regarding the depositary's escalation procedures, including the identification of the persons to be contacted within the AIF and, as the case may be, or the AIFM by the depositary when it launches such a procedure;
- (p) a commitment by the depositary to notify the AIFM when it becomes aware that the segregation of assets is not, or is no longer sufficient to ensure protection from insolvency of a third party, to whom safe-keeping functions are delegated in accordance with sections 11.1 to 11.4 below in a specific jurisdiction;



- (q) the procedures ensuring that the depository, in respect of its duties, has the ability to enquire into the conduct of the AIFM and, as the case may be, or the AIF and to assess the quality of information transmitted including by way of having access to the books of the AIF and, as the case may be, or AIFM or by way of on-site visits;
 - (r) the procedures ensuring that the AIFM and, as the case may be, or the AIF can review the performance of the depository in respect of the depository's contractual obligations.
- 2.2 The details of the means and procedures set out in points (a) to (r) above must be described in the contract appointing the depository or any subsequent amendment to the contract. Any subsequent amendment must also be evidenced in writing.
- 2.3 The parties may agree to transmit all or part of the information that flows between them electronically provided that proper recording of such information is ensured.
- 2.4 There is no obligation for each AIF to enter into separate written agreements with the depository. It will be possible for the AIFM and the depository to enter into a framework agreement listing the AIFs managed by that AIFM to which the agreement applies.
- 2.5 The contract appointing the depository and any subsequent agreement shall specify the applicable governing law.

3. Choice of depository

- 3.1 The depository must be one of the following:
 - (a) an EU credit institution (e.g. an EU bank);
 - (b) an investment firm authorised under the Markets in Financial Instruments Directive (2004/39/EC) (MiFID), subject to the same capital requirements as credit institutions in accordance with the Capital Requirements Directive (2006/48/EC and 2006/49/EC) (CRD); or
 - (c) a prudentially regulated and supervised institution of a type that (at the date the AIFMD came into force, that is, 21 July 2011) is eligible to be a UCITS depository under Article 23(3) of the UCITS Directive (2009/65/EC).
- 3.2 For non-EU AIFs only, the depository may also be a non-EU entity of the same nature as referred to in section 3.1(a) and (b), provided that it is subject to effectively enforced prudential regulation and supervision to the same effect as that under EU law.

Private equity AIFs

- 3.3 Section 3.4 below applies only to AIFs which:
 - (a) have no redemption rights exercisable during the period of 5 years from the date of the initial investments, and
 - (b) in accordance with their core investment policy, generally do not invest in assets that are required by this section to be held in custody or generally invest in issuers or non-listed companies in order to potentially acquire control over such companies in accordance with Article 26 of the AIFMD on the acquisition of non-listed companies.

- 3.4 In relation to AIFs to which this section applies, the depository may be an entity which:
- (a) carries out depository functions as part of its professional or business activities in respect of which it is subject to mandatory professional registration recognised by law or to legal or regulatory provisions or rules of professional conduct, and
 - (b) can provide sufficient financial and professional guarantees to enable it to perform effectively the relevant depository functions and meet the commitments inherent in those functions.

4. Location of depository

- 4.1 The depository must be established in one of the following locations:
- (a) Gibraltar, in the case of an EU AIF for which Gibraltar is its home Member State;
 - (b) in the case of any other EU AIF, its home Member State;
 - (c) for non-EU AIFs, the third country where the AIF is established, the home Member State of the AIFM managing the AIF or the Member State of reference of the AIFM managing the AIF.

5. Appointment of depository in a third country

- 5.1 Without prejudice to section 3 above, the appointment of a depository established in a third country must, at all times, be subject to the following conditions:
- (a) the competent authorities of the Member States in which the units or shares of the non-EU AIF are intended to be marketed, and, in so far as different, of the home Member State of the AIFM, have signed cooperation and exchange of information arrangements with the competent authorities of the depository;
 - (b) the depository is subject to effective prudential regulation, including minimum capital requirements, and supervision which have the same effect as European Union law and are effectively enforced;
 - (c) the third country where the depository is established is not listed as a Non-Cooperative Country and Territory by FATF;
 - (d) the Member States in which the units or shares of the non-EU AIF are intended to be marketed, and, in so far as different, the home Member State of the AIFM, have signed an agreement with the third country where the depository is established which fully complies with the standards laid down in Article 26 of the OECD Model Tax Convention on Income and on Capital and ensures an effective exchange of information in tax matters including any multilateral tax agreements;
 - (e) the depository must by contract be liable to the AIF or to the investors of the AIF, in accordance with this section and consistently with sections 12.1 and 13.1 below, and must expressly agree to comply with this section.
- 5.2 In relation to section 5.1(b) above, the effectiveness of prudential regulation and supervision applicable to a depository in a third country whether it has the same

effect as that provided for under EU law and its effective enforcement shall be assessed against the following criteria:

- (a) the depository is subject to authorisation and on-going supervision by a public competent authority with adequate resources to fulfil its tasks;
- (b) the law of the third country lay down criteria for authorisation as a depository that have the same effect as those laid down for access to the business of credit institutions or investment firms within the EU;
- (c) the capital requirements imposed on the depository in the third country have the same effect as those applicable in the EU depending on whether the depository is of the same nature as an EU credit institution or investment firm;
- (d) the operating conditions applicable to a depository in the third country have the same effect as those laid down for credit institutions or investment firms within the EU depending on the nature of the depository;
- (e) the requirements regarding the performance of the specific duties as AIF depository established in the law of the third country have the same effect as those provided for in sections 7.1 to 14.1 below and its implementing measures and the relevant national law;
- (f) the law of the third country provides for the application of sufficiently dissuasive enforcement actions in the event of breach by the depository of the requirements and conditions referred to points (a) to (e).

6. Avoidance of conflicts between depository, AIFM, AIF, investors

- 6.1 In order to avoid conflicts of interest between the depository, the AIFM, the AIF or its investors (or another combination):
 - (a) an AIFM must not act as depository, i.e. the depository should be separate from the AIFM;
 - (b) a depository may not carry out activities with regard to the AIF or the AIFM on behalf of the AIF that may create conflicts of interest unless:
 - (i) the depository has functionally and hierarchically separated the performance of its depository tasks from its other potentially conflicting tasks, and
 - (ii) the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF.
 - (c) a prime broker acting as counterparty to an AIF shall not act as depository for that AIF, unless:
 - (i) it has functionally and hierarchically separated the performance of its depository functions from its tasks as prime broker, and
 - (ii) the potential conflicts of interest are properly identified, managed, monitored and disclosed to the investors of the AIF.
- 6.2 Delegation by the depository to a prime broker of its custody tasks in accordance with this section is allowed if the relevant conditions are met.
- 6.3 In the context of their respective roles, the AIFM and the depository must act honestly, fairly, professionally, independently and in the interest of the AIF and the investors of the AIF.

7. Cash flow monitoring

- 7.1 The depository must in general ensure that the AIF's cash flows are properly monitored; in particular, it must:
- (a) ensure that all payments made by or on behalf of investors upon the subscription of units or shares of an AIF have been received; and
 - (b) ensure that all cash of the AIF has been booked in cash accounts opened in the name of the AIF or in the name of the AIFM acting on behalf of the AIF or in the name of the depository acting on behalf of the AIF at an entity referred to in Article 18(1)(a) to (c) of Directive 2006/73/EC (on investment firms). This should be in the relevant market where cash accounts are required, provided that the entity is subject to effective prudential regulation and supervision which have the same effect as EU law and are effectively enforced and in accordance with the principles set out in Article 16 of Directive 2006/73/EC (on investment firms).
- 7.2 Where the cash accounts are opened in the name of the depository acting on behalf of the AIF, no cash of the entity referred to in section 7.1 above and none of the depository's own cash shall be booked on such accounts.
- 7.3 Where a cash account is maintained or opened at an entity referred to section 7.1 above in the name of the AIF, in the name of the AIFM acting on behalf of the AIF or in the name of the depository acting on behalf of the AIF, an AIFM shall ensure that the depository is provided, upon commencement of its duties and on an on-going basis, with all relevant information it needs to comply with its obligations.
- 7.4 In order to have access to all information regarding the AIF's cash accounts and have a clear overview of all the AIF's cash flows, a depository shall at least:
- (a) be informed, upon its appointment, of all existing cash accounts opened in the name of the AIF, or in the name of the AIFM acting on behalf of the AIF;
 - (b) be informed at the opening of any new cash account by the AIF or by the AIFM acting on behalf of the AIF;
 - (c) be provided with all information related to the cash accounts opened at a third party entity, directly by those third parties.
- 7.5 A depository shall ensure effective and proper monitoring of the AIF's cash flows and in particular it shall at least:
- (a) ensure that all cash of the AIF is booked in accounts opened with entities referred to in points (a), (b) and (c) of Article 18(1) of Directive 2006/73/EC (on investment firms) in the relevant markets where cash accounts are required for the purposes of the AIF's operations and which are subject to prudential regulation and supervision that has the same effect as EU law, is effectively enforced and is in accordance with the principles laid down in Article 16 of Directive 2006/73/EC;
 - (b) implement effective and proper procedures to reconcile all cash flow movements and perform such reconciliations on a daily basis or, in case of infrequent cash movements, when such cash flow movements occur;
 - (c) implement appropriate procedures to identify at the close of business day significant cash flows and in particular those which could be inconsistent with the AIF's operations;
 - (d) review periodically the adequacy of those procedures including through a full review of the reconciliation process at least once a year and

ensuring that the cash accounts opened in the name of the AIF, in the name of the AIFM acting on behalf of the AIF or in the name of the depositary acting on behalf of the AIF are included in the reconciliation process;

- (e) monitor on an on-going basis the outcomes of the reconciliations and actions taken as a result of any discrepancies identified by the reconciliation procedures and notify the AIFM if an irregularity has not been rectified without undue delay and also the competent authorities if the situation cannot be clarified and, as the case may be, or corrected;
- (f) check the consistency of its own records of cash positions with those of the AIFM. The AIFM shall ensure that all instructions and information related to a cash account opened with a third party are sent to the depositary, so that the depositary is able to perform its own reconciliation procedure.

- 7.6 An AIFM shall ensure that the depositary is provided with information about payments made by or on behalf of investors upon the subscription of units or shares of an AIF at the close of each business day when the AIFM, the AIF or a party acting on behalf of it, such as a transfer agent receives such payments or an order from the investor. The AIFM shall ensure that the depositary receives all other relevant information it needs to make sure that the payments are then booked in cash accounts opened in the name of the AIF or in the name of the AIFM acting on behalf of the AIF or in the name of the depositary in accordance with sections 7.1 and 7.2 above.

8. Safe-keeping of assets

Financial instruments to be held in custody

- 8.1 The assets of the AIF or the AIFM acting on behalf of the AIF must be entrusted to the depositary for safe-keeping, as follows:
- (a) for financial instruments that can be held in custody:
 - (i) the depositary shall hold in custody all financial instruments that can be registered in a financial instruments account opened in the depositary's books and all financial instruments that can be physically delivered to the depositary;
 - (ii) for that purpose, the depositary shall ensure that all those financial instruments that can be registered in a financial instruments account opened in the depositary's books are registered in its books within segregated accounts in accordance with the principles set out in Article 16 of Directive 2006/73/EC (on investment firms). They shall be opened in the name of the AIF or the AIFM acting on behalf of the AIF, so that they can be clearly identified as belonging to the AIF in accordance with the applicable law at all times;
 - (b) for other assets:
 - (i) the depositary shall verify the ownership of the AIF or the AIFM acting on behalf of the AIF of such assets and shall maintain a record of those assets for which it is satisfied that the AIF or the AIFM acting on behalf of the AIF holds the ownership of such assets;
 - (ii) the assessment whether the AIF or the AIFM acting on behalf of the AIF holds the ownership shall be based on information or

- documents provided by the AIF or the AIFM and, where available, on external evidence;
- (iii) the depository shall keep its record up to date.
- 8.2 Financial instruments belonging to the AIF or to the AIFM acting on behalf of the AIF which are not able to be physically delivered to the depository shall be included in the scope of the custody duties of the depository where all of the following requirements are met:
- (a) they are transferable securities including those which embed derivatives as referred to in the last subparagraph of Article 51(3) of Directive 2009/65/EC (UCITS) and Article 10 of Directive 2007/16/EC (on definitions under UCITS), money market instruments or units of collective investment undertakings.
 - (b) they are capable of being registered or held in an account directly or indirectly in the name of the depository.
- 8.3 Financial instruments which, in accordance with applicable national law, are only directly registered in the name of the AIF with the issuer itself or its agent, such as a registrar or a transfer agent, shall not be held in custody.
- 8.4 Financial instruments belonging to the AIF or the AIFM acting on behalf of the AIF which are able to be physically delivered to the depository shall always be included in the scope of the custody duties of the depository.

Safekeeping duties with regards to assets held in custody

- 8.5 In order to comply with the obligations laid down in section 8.1(a) with respect to financial instruments to be held in custody, a depository shall ensure at least that:
- (a) the financial instruments are properly registered in accordance with section 8.1(a)(ii) above;
 - (b) records and segregated accounts are maintained in a way that ensures their accuracy, and in particular record the correspondence with the financial instruments and cash held for AIFs;
 - (c) reconciliations are conducted on a regular basis between the depository's internal accounts and records and those of any third party to whom custody functions are delegated in accordance with sections 11.1 to 11.4 below;
 - (d) due care is exercised in relation to the financial instruments held in custody in order to ensure a high standard of investor protection;
 - (e) all relevant custody risks throughout the custody chain are assessed and monitored and the AIFM is informed of any material risk identified;
 - (f) adequate organisational arrangements are introduced to minimise the risk of loss or diminution of the financial instruments, or of rights in connection with those financial instruments as a result of fraud, poor administration, inadequate registering or negligence;
 - (g) the AIFs ownership right or the ownership right of the AIFM acting on behalf of the AIF over the assets is verified.
- 8.6 Where a depository has delegated its custody functions to a third party in accordance with sections 11.1 to 11.4 below, it shall remain subject to the requirements of points (b) to (e) of section 8.5 above. It shall also ensure that the third party complies with the requirements of points (b) to (g) of section 8.5 above and the segregation obligations laid down in sections 11.12 to 11.14 below.

- 8.7 A depository's safe-keeping duties shall apply on a look-through basis to underlying assets held by financial and, as the case may be, or legal structures controlled directly or indirectly by the AIF or the AIFM acting on behalf of the AIF. This requirement shall not apply to fund of funds structures or master-feeder structures where the underlying funds have a depository which keeps in custody the assets of these funds.

Safekeeping duties regarding ownership verification and record keeping

- 8.8 An AIFM shall provide the depository, upon commencement of its duties and on an on-going basis, with all relevant information the depository needs in order to comply with its obligations pursuant to section 8.1(b) above, and ensure that the depository is provided with all relevant information by third parties.
- 8.9 In order to comply with the obligations referred to in section 8.1(b) above, a depository shall at least:
- (a) have access without undue delay to all relevant information it needs in order to perform its ownership verification and record-keeping duties, including relevant information to be provided to the depository by third parties;
 - (b) possess sufficient and reliable information for it to be satisfied of the AIF's ownership right or of the ownership right of the AIFM acting on behalf of the AIF over the assets;
 - (c) maintain a record of those assets for which it is satisfied that the AIF or the AIFM acting on behalf of the AIF holds the ownership. In order to comply with this obligation, the depository shall:
 - (i) register in its record, in the name of the AIF, assets, including their respective notional amounts, for which it is satisfied that the AIF or the AIFM acting on behalf of the AIF holds the ownership;
 - (ii) be able to provide at any time a comprehensive and up-to-date inventory of the AIF's assets, including their respective notional amounts.

For the purpose of point (c)(ii), the depository shall ensure that there are procedures in place so that registered assets cannot be assigned, transferred, exchanged or delivered without the depository or its delegate having been informed of such transactions and the depository shall have access without undue delay to documentary evidence of each transaction and position from the relevant third party. The AIFM shall ensure that the relevant third party provides the depository without undue delay with certificates or other documentary evidence every time there is a sale or acquisition of assets or a corporate action resulting in the issue of financial instruments and at least once a year.

- 8.10 In any event, a depository shall ensure that the AIFM has and implements appropriate procedures to verify that the assets acquired by the AIF it manages are appropriately registered in the name of the AIF or in the name of the AIFM acting on behalf of the AIF, and to check the consistency between the positions in the AIFM's records and the assets for which the depository is satisfied that the AIF or the AIFM acting on behalf of the AIF holds the ownership. The AIFM shall ensure that all instructions and relevant information related to the AIF's assets are sent to the depository, so that the depository is able to perform its own verification or reconciliation procedure.



- 8.11 A depository shall set up and implement an escalation procedure for situations where an anomaly is detected including notification of the AIFM and of the competent authorities if the situation cannot be clarified and, as the case may be, or corrected.
- 8.12 A depository's safe-keeping duties referred to in section 8.8 to 8.11 shall apply on a look-through basis to underlying assets held by financial and, as the case may be, or legal structures established by the AIF or by the AIFM acting on behalf of the AIF for the purposes of investing in the underlying assets and which are controlled directly or indirectly by the AIF or by the AIFM acting on behalf of the AIF. This requirement shall not apply to fund of funds structures and master-feeder structures where the underlying funds have a depository which provides ownership verification and record-keeping functions for this fund's assets.
- 8.13 The assets referred to in section 8.1 above may not be reused by the depository without the prior consent of the AIF or the AIFM acting on behalf of the AIF.

9. Oversight duties

General

- 9.1 In addition to the tasks referred to in sections 7 and 8 above, the depository must:
- (a) ensure that the sale, issue, re-purchase, redemption and cancellation of units or shares of the AIF are carried out in accordance with the applicable national law and the AIF rules or instruments of incorporation;
 - (b) ensure that the value of the units or shares of the AIF is calculated in accordance with the applicable national law, the AIF rules or instruments of incorporation and the procedures laid down in Article 19 of the AIFMD (on valuation);
 - (c) carry out the instructions of the AIFM, unless they conflict with the applicable national law or the AIF rules or instruments of incorporation;
 - (d) ensure that in transactions involving the AIF's assets any consideration is remitted to the AIF within the usual time limits; and
 - (e) ensure that an AIF's income is applied in accordance with the applicable national law and the AIF rules or instruments of incorporation.
- 9.2 At the time of its appointment, the depository shall assess the risks associated with the nature, scale and complexity of the AIF's strategy and the AIFM's organisation in order to devise oversight procedures which are appropriate to the AIF and the assets in which it invests and which are then implemented and applied. Such procedures shall be regularly updated.
- 9.3 In performing its oversight duties under section 9.1 above, a depository shall perform ex-post controls and verifications of processes and procedures that are under the responsibility of the AIFM, the AIF or an appointed third party. The depository shall in all circumstances ensure that an appropriate verification and reconciliation procedure exists which is implemented and applied and frequently reviewed. The AIFM shall ensure that all instructions related to the AIF's assets and operations are sent to the depository, so that the depository is able to perform its own verification or reconciliation procedure.
- 9.4 A depository shall establish a clear and comprehensive escalation procedure to deal with situations where potential irregularities are detected in the course of

its oversight duties, the details of which shall be made available to the competent authorities of the AIFM upon request.

- 9.5 An AIFM shall provide the depository, upon commencement of its duties and on an on-going basis, with all relevant information it needs in order to comply with its obligations pursuant to section 9.1 above including information to be provided to the depository by third parties. The AIFM shall particularly ensure that the depository is able to have access to the books and perform on-site visits on premises of the AIFM and of those of any service provider appointed by the AIF or the AIFM, such as administrators or external valuers and, as the case may be, or to review reports and statements of recognised external certifications by qualified independent auditors or other experts in order to ensure the adequacy and relevance of the procedures in place.

Duties regarding subscriptions and redemptions

- 9.6 In order to comply with point (a) of section 9.1 above, the depository shall meet the following requirements:
- (1) The depository shall ensure that the AIF, the AIFM or the designated entity has established, implements and applies an appropriate and consistent procedure to:
 - (i) reconcile the subscription orders with the subscription proceeds, and the number of units or shares issued with the subscription proceeds received by the AIF;
 - (ii) reconcile the redemption orders with the redemptions paid, and the number of units or shares cancelled with the redemptions paid by the AIF;
 - (iii) verify on a regular basis that the reconciliation procedure is appropriate.

For the purpose of points (i), (ii) and (iii), the depository shall in particular regularly check the consistency between the total number of units or shares in the AIF's accounts and the total number of outstanding shares or units that appear in the AIF's register.

- (2) A depository shall ensure and regularly check that the procedures regarding the sale, issue, repurchase, redemption and cancellation of shares or units of the AIF comply with the applicable national law and with the AIF rules or instruments of incorporation and verify that these procedures are effectively implemented.
- (3) The frequency of the depository's checks shall be consistent with the frequency of subscriptions and redemptions.

Duties regarding the valuation of shares/units

- 9.7 In order to comply with point (b) of section 9.1 above, the depository shall:
- (a) verify on an on-going basis that appropriate and consistent procedures are established and applied for the valuation of the assets of the AIF in compliance with Article 19 of AIFMD (on valuation) and its implementing measures and with the AIF rules and instruments of incorporation; and
 - (b) ensure that the valuation policies and procedures are effectively implemented and periodically reviewed.
- 9.8 A depository's procedures shall be conducted at a frequency consistent with the frequency of the AIF's valuation policy as defined in Article 19 of AIFMD (on valuation) and its implementing measures.

- 9.9 Where a depository considers that the calculation of the value of the shares or units of the AIF has not been performed in compliance with applicable law or the AIF rules or with Article 19 of AIFMD (on valuation), it shall notify the AIFM and, as the case may be, or the AIF and ensure that timely remedial action is taken in the best interest of the investors in the AIF.
- 9.10 Where an external valuer has been appointed, a depository shall check that the external valuer's appointment is in accordance with Article 19 of AIFMD (on valuation) and its implementing measures.

Duties regarding the carrying out of the AIFM's instructions

- 9.11 In order to comply with point (c) of section 9.1 above, the depository shall at least:
- (a) set up and implement appropriate procedures to verify that the AIF and AIFM comply with applicable laws and regulations and with the AIF's rules and instruments of incorporation. In particular, the depository shall monitor the AIF's compliance with investment restrictions and leverage limits set in the AIF's offering documents. Those procedures shall be proportionate to the nature, scale and complexity of the AIF; and
 - (b) set up and implement an escalation procedure where the AIF has breached one of the limits or restrictions referred to in point (a).

Duties regarding the timely settlement of transactions

- 9.12 In order to comply with point (d) of section 9.1 above, the depository shall set up a procedure to detect any situation where a consideration related to the operations involving the assets of the AIF or of the AIFM acting on behalf of the AIF is not remitted to the AIF within the usual time limits, notify the AIFM and, where the situation has not been remedied, request the restitution of the financial instruments from the counterparty where possible.
- 9.13 Where transactions do not take place on a regulated market, the usual time limits shall be assessed with regard to the conditions attached to the transactions (OTC derivative contracts or investments in real estate assets or in privately held companies).

Duties related to the AIF's income distribution

- 9.14 In order to comply with point (e) of section 9.1 above, the depository shall:
- (a) ensure that the net income calculation, once declared by the AIFM, is applied in accordance with the AIF rules, instruments of incorporation and applicable national law;
 - (b) ensure that appropriate measures are taken where the AIF's auditors have expressed reserves on the annual financial statements. The AIF or the AIFM acting on behalf of the AIF shall provide the depository with all information on reserves expressed on the financial statements; and
 - (c) check the completeness and accuracy of dividend payments, once they are declared by the AIFM, and, where relevant, of the carried interest.
- 9.15 Where a depository considers that the income calculation has not been performed in compliance with applicable law or with the AIF rules or instruments of incorporation, it shall notify the AIFM and, as the case may be, or the AIF and

ensure that timely remedial action has been taken in the best interest of the AIF's investors.

10. Reporting obligations for prime brokers

- 10.1 Where a prime broker has been appointed, the AIFM shall ensure that from the date of that appointment an agreement is in place pursuant to which the prime broker is required to make available to the depositary in particular a statement in a durable medium which contains the following information:
- (a) the values of the items listed in section 10.3 below at the close of each business day;
 - (b) details of any other matters necessary to ensure that the depositary of the AIF has up-to-date and accurate information about the value of assets the safekeeping of which has been delegated in accordance with section 11.1 below.
- 10.2 The statement referred to in section 10.1 above shall be made available to the depositary of the AIF no later than the close of the next business day to which it relates.
- 10.3 The items referred to in point (a) of section 10.1 above shall include:
- (a) the total value of assets held by the prime broker for the AIF, where safekeeping functions are delegated in accordance with section 11.1 below, and the value of each of the following:
 - (i) cash loans made to the AIF and accrued interest;
 - (ii) securities to be redelivered by the AIF under open short positions entered into on behalf of the AIF;
 - (iii) current settlement amounts to be paid by the AIF under any futures contracts;
 - (iv) short sale cash proceeds held by the prime broker in respect of short positions entered into on behalf of the AIF;
 - (v) cash margins held by the prime broker in respect of open futures contracts entered into on behalf of the AIF. This obligation is in addition to the obligations under sections 7.6, 8.1, 8.3 and 8.4 above;
 - (vi) mark-to-market close-out exposures of any OTC transaction entered into on behalf of the AIF;
 - (vii) total secured obligations of the AIF against the prime broker; and
 - (viii) all other assets relating to the AIF;
 - (b) the value of other assets referred to in point (b) of section 8.1 above held as collateral by the prime broker in respect of secured transactions entered into under a prime brokerage agreement;
 - (c) the value of the assets where the prime broker has exercised a right of use in respect of the AIF's assets;
 - (d) a list of all the institutions at which the prime broker holds or may hold cash of the AIF in an account opened in the name of the AIF or in the name of the AIFM acting on behalf of the AIF in accordance with sections 7.1 and 7.2 above.

11. Delegation of depositary duties

- 11.1 The depositary shall not delegate to third parties its functions as described in this section, save for those referred to in section 8.1 above.
- 11.2 The depositary may delegate to third parties the functions referred to in section 8.1 above subject to the following conditions:
- (a) the tasks are not delegated with the intention of avoiding the requirements of the AIFMD;
 - (b) the depositary can demonstrate that there is an objective reason for the delegation;
 - (c) the depositary has exercised all due skill, care and diligence in the selection and the appointment of any third party to whom it wants to delegate parts of its tasks, and keeps exercising all due skill, care and diligence in the periodic review and on-going monitoring of any third party to whom it has delegated parts of its tasks and of the arrangements of the third party in respect of the matters delegated to it; and
 - (d) the depositary ensures that the third party meets the following conditions at all times during the performance of the tasks delegated to it:
 - (i) the third party has the structures and the expertise that are adequate and proportionate to the nature and complexity of the assets of the AIF or the AIFM acting on behalf of the AIF which have been entrusted to it;
 - (ii) for custody tasks referred to in section 8.1(a), the third party is subject to effective prudential regulation, including minimum capital requirements, and supervision in the jurisdiction concerned and the third party is subject to an external periodic audit to ensure that the financial instruments are in its possession;
 - (iii) the third party segregates the assets of the depositary's clients from its own assets and from the assets of the depositary in such a way that they can at any time be clearly identified as belonging to clients of a particular depositary;
 - (iv) the third party does not make use of the assets without the prior consent of the AIF or the AIFM acting on behalf of the AIF and prior notification to the depositary; and
 - (v) the third party complies with the general obligations and prohibitions set out in sections 5.1 and 6.2 above.
- 11.3 Notwithstanding section 11.2(d)(ii), where the law of a third country requires that certain financial instruments be held in custody by a local entity and no local entities satisfy the delegation requirements laid down in that point, the depositary may delegate its functions to such a local entity only to the extent required by the law of the third country and only for as long as there are no local entities that satisfy the delegation requirements, subject to the following requirements:
- (a) the investors of the relevant AIF must be duly informed that such delegation is required due to legal constraints in the law of the third country and of the circumstances justifying the delegation, prior to their investment; and

- (b) the AIF, or the AIFM on behalf of the AIF, must instruct the depositary to delegate the custody of such financial instruments to such local entity;

The third party may, in turn, sub-delegate those functions, subject to the same requirements (and this section shall apply, with any necessary modifications, to the relevant parties).

- 11.4 For the purposes of this section, the provision of services as specified by Directive 98/26/EC (on securities settlement systems) by securities settlement systems as designated for the purposes of that Directive or the provision of similar services by third-country securities settlement systems shall not be considered a delegation of custody functions.

Due Diligence

- 11.5 In order to fulfil the obligations laid down in point (c) of section 11.2 above, a depositary shall implement and apply an appropriate documented due diligence procedure for the selection and on-going monitoring of the delegate. That procedure shall be reviewed regularly, at least once a year, and made available upon request to competent authorities.
- 11.6 When selecting and appointing a third party, to whom safekeeping functions are delegated in accordance with sections 11.1 to 11.4 above, a depositary shall exercise all due skill, care and diligence to ensure that entrusting financial instruments to this third party provides an adequate standard of protection. It shall at least:
- (a) assess the regulatory and legal framework, including country risk, custody risk and the enforceability of the third party's contracts. That assessment shall in particular enable the depositary to determine the potential implication of an insolvency of the third party for the assets and rights of the AIF. If a depositary becomes aware that the segregation of assets is not sufficient to ensure protection from insolvency because of the law of the country where the third party is located, it shall immediately inform the AIFM;
 - (b) assess whether the third party's practice, procedures and internal controls are adequate to ensure that the financial instruments of the AIF or of the AIFM acting on behalf of the AIF are subject to a high standard of care and protection;
 - (c) assess whether the third party's financial strength and reputation are consistent with the tasks delegated. That assessment shall be based on information provided by the potential third party as well as other data and information, where available; and
 - (d) ensure that the third party has the operational and technological capabilities to perform the delegated custody tasks with a satisfactory degree of protection and security.
- 11.7 A depositary shall exercise all due skill, care and diligence in the periodic review and on-going monitoring to ensure that the third party continues to comply with the criteria provided for in section 11.5 above and the conditions set out in point (d) of section 11.2 above. To this end the depositary shall at least:
- (a) monitor the third party's performance and its compliance with the depositary's standards;
 - (b) ensure that the third party exercises a high standard of care, prudence and diligence in the performance of its custody tasks and in particular that it effectively segregates the financial instruments in line with the requirements of section 11.12 below; and

- (c) review the custody risks associated with the decision to entrust the assets to the third party and without undue delay notify the AIF or AIFM of any change in those risks. That assessment shall be based on information provided by the third party and other data and information where available. During market turmoil or when a risk has been identified, the frequency and the scope of the review shall be increased. If the depositary becomes aware that the segregation of assets is no longer sufficient to ensure protection from insolvency because of the law of the country where the third party is located, it shall immediately inform the AIFM.
- 11.8 Where the third party further delegates any of the functions delegated to it, the conditions and criteria set out in sections 11.5 to 11.7 above shall apply mutatis mutandis.
- 11.9 A depositary shall monitor compliance with section 6.1 above.
- 11.10 A depositary shall devise contingency plans for each market in which it appoints a third party in accordance with sections 11.1 to 11.4 to perform safekeeping duties. Such a contingency plan shall include the identification of an alternative provider, if any.
- 11.11 A depositary shall take measures, including termination of the contract, which are in the best interest of the AIF and its investors where the delegate no longer complies with the requirements.

Segregation obligation

- 11.12 Where safekeeping functions have been delegated wholly or partly to a third party, a depositary shall ensure that the third party, to whom safe-keeping functions are delegated pursuant to sections 11.1 to 11.4 above, acts in accordance with the segregation obligation laid down in point (iii) of section 11.2(d) above by verifying that the third party:
- (a) keeps such records and accounts as are necessary to enable it at any time and without delay to distinguish assets of the depositary's AIF clients from its own assets, assets of its other clients, assets held by the depositary for its own account and assets held for clients of the depositary which are not AIFs;
 - (b) maintains records and accounts in a way that ensures their accuracy, and in particular their correspondence to the assets safe-kept for the depositary's clients;
 - (c) conducts, on a regular basis, reconciliations between its internal accounts and records and those of the third party to whom it has delegated safe-keeping functions in accordance with section 11.3 above;
 - (d) introduces adequate organisational arrangements to minimise the risk of loss or diminution of financial instruments or of rights in connection with those financial instruments as a result of misuse of the financial instruments, fraud, poor administration, inadequate record-keeping or negligence;
 - (e) where the third party is an entity referred to in points (a), (b) and (c) of Article 18(1) of Directive 2006/73/EC (on investment firms) which is subject to effective prudential regulation and supervision that has the same effect as EU law and is effectively enforced, the depositary shall take the necessary steps to ensure that the AIF's cash is held in an account or accounts in accordance with section 7.1 above.

- 11.13 Where a depository has delegated its custody functions to a third party in accordance with sections 11.1 to 11.4 above, the monitoring of the third party's compliance with its segregation obligations shall ensure that the financial instruments belonging to its clients are protected from any insolvency of that third party. If according to the applicable law, including in particular the law relating to property or insolvency, the requirements laid down in section 11.12 are not sufficient to achieve that objective, the depository shall assess what additional arrangements are to be made in order to minimise the risk of loss and maintain an adequate standard of protection.
- 11.14 Sections 11.12 and 11.13 above shall apply *mutatis mutandis* when the third party, to whom safekeeping functions are delegated in accordance with sections 11.1 and 11.4 above, has decided to delegate all or part of its safe-keeping functions to another third party pursuant to section 11.3 above.

12. Depository liability

- 12.1 The depository must be liable to the AIF or to the investors of the AIF, for the loss by the depository or a third party to whom the custody of financial instruments held in custody in accordance with section 8.1(a) has been delegated; and:
- (a) in the case of such a loss of a financial instrument held in custody, the depository must return a financial instrument of identical type or the corresponding amount to the AIF or the AIFM acting on behalf of the AIF without undue delay;
 - (b) the depository shall not be liable if it can prove that the loss has arisen as a result of an external event beyond its reasonable control, the consequences of which would have been unavoidable despite all reasonable efforts to the contrary;
 - (c) the depository shall also be liable to the AIF, or to the investors of the AIF, for all other losses suffered by them as a result of the depository's negligent or intentional failure to properly fulfil its obligations pursuant to this Directive.

Loss of financial instrument held in custody

- 12.2 A loss of a financial instrument held in custody within the meaning of section 12.1 above shall be deemed to have taken place when, in relation to a financial instrument held in custody by the depository or by a third party to whom the custody of financial instruments held in custody has been delegated, any of the following conditions is met:
- (a) a stated right of ownership of the AIF is demonstrated not to be valid because it either ceased to exist or never existed;
 - (b) the AIF has been definitively deprived of its right of ownership over the financial instrument; and
 - (c) the AIF is definitively unable to directly or indirectly dispose of the financial instrument.
- 12.3 The ascertainment by the AIFM of the loss of a financial instrument shall follow a documented process readily available to the competent authorities. Once a loss is ascertained, it shall be notified immediately to investors in a durable medium.

- 12.4 A financial instrument held in custody shall not be deemed to be lost within the meaning of section 12.1 above where an AIF is definitively deprived of its right of ownership in respect of a particular instrument, but this instrument is substituted by or converted into another financial instrument or instruments.
- 12.5 In the event of insolvency of the third party to whom the custody of financial instruments held in custody has been delegated, the loss of a financial instrument held in custody shall be ascertained by the AIFM as soon as one of the conditions listed in section 12.2 above is met with certainty.

There shall be certainty as to whether any of the conditions set out in section 12.2 above is fulfilled at the latest at the end of the insolvency proceedings. The AIFM and the depository shall monitor closely the insolvency proceedings to determine whether all or some of the financial instruments entrusted to the third party to whom the custody of financial instruments has been delegated are effectively lost.

- 12.6 A loss of a financial instrument held in custody shall be ascertained irrespective of whether the conditions listed in section 12.2 above are the result of fraud, negligence or other intentional or non-intentional behaviour.

13. Liability discharge by the depository

- 13.1 The depository's liability shall not be affected by any delegation referred to in section 11 above; but in the case of a loss of financial instruments held in custody by a third party pursuant to section 11 above, the depository may discharge itself of liability if it can prove that:
- (a) all requirements for the delegation of its custody tasks set out in Section 11.2 above are met;
 - (b) a written contract between the depository and the third party expressly transfers the liability of the depository to that third party and makes it possible for the AIF or the AIFM acting on behalf of the AIF to make a claim against the third party in respect of the loss of financial instruments or for the depository to make such a claim on their behalf; and
 - (c) a written contract between the depository and the AIF or the AIFM acting on behalf of the AIF, expressly allows a discharge of the depository's liability and establishes the objective reason to contract such a discharge.
- 13.2 In addition, where the law of a third country requires that certain financial instruments are held in custody by a local entity and there are no local entities that satisfy the delegation requirements laid down in this section, the depository can discharge itself of liability provided that the following conditions are met:
- (a) the rules or instruments of incorporation of the AIF concerned expressly allow for such a discharge under the conditions set out in this section;
 - (b) the investors of the relevant AIF have been duly informed of that discharge and of the circumstances justifying the discharge prior to their investment;
 - (c) the AIF or the AIFM on behalf of the AIF instructed the depository to delegate the custody of such financial instruments to a local entity;

- (d) there is a written contract between the depository and the AIF or the AIFM acting on behalf of the AIF, which expressly allows such a discharge; and
- (e) there is a written contract between the depository and the third party that expressly transfers the liability of the depository to that local entity and makes it possible for the AIF or the AIFM acting on behalf of the AIF to make a claim against that local entity in respect of the loss of financial instruments or for the depository to make such a claim on their behalf.

Liability discharge under section 12.1 above

13.3 A depository's liability under the section 12.1(a) and (b) above shall not be triggered provided the depository can prove that all the following conditions are met:

- (a) the event which led to the loss is not the result of any act or omission of the depository or of a third party to whom the custody of financial instruments held in custody in accordance with point (a) of section 8.1 above has been delegated;
- (b) the depository could not have reasonably prevented the occurrence of the event which led to the loss despite adopting all precautions incumbent on a diligent depository as reflected in common industry practice; and
- (c) despite rigorous and comprehensive due diligence, the depository could not have prevented the loss.

This condition may be deemed to be fulfilled when the depository has ensured that the depository and the third party to whom the custody of financial instruments held in custody in accordance with point (a) of section 8.1 above has been delegated have taken all of the following actions:

- (i) establishing, implementing, applying and maintaining structures and procedures and insuring expertise that is adequate and proportionate to the nature and complexity of the assets of the AIF in order to identify in a timely manner and monitor on an on-going basis external events which may result in loss of a financial instrument held in custody;
- (ii) assessing on an on-going basis whether any of the events identified under the first indent presents a significant risk of loss of a financial instrument held in custody; and
- (iii) informing the AIFM of the significant risks identified and taking appropriate actions, if any, to prevent or mitigate the loss of financial instruments held in custody, where actual or potential external events have been identified which are believed to present a significant risk of loss of a financial instrument held in custody.

13.4 The requirements referred to in points (a) and (b) of section 13.3 above may be deemed to be fulfilled in the following circumstances;

- (a) natural events beyond human control or influence;
- (b) the adoption of any law, decree, regulation, decision or order by any government or governmental body, including any court or tribunal, which impacts the financial instruments held in custody;
- (c) war, riots or other major upheavals.

- 13.5 The requirements referred to in points (a) and (b) of section 13.4 above shall not be deemed to be fulfilled in cases such as an accounting error, operational failure, fraud, failure to apply the segregation requirements at the level of the depositary or a third party to whom the custody of financial instruments held in custody in accordance with point (a) of Article 21(8) of Directive 2011/61/EU has been delegated.
- 13.6 This Article shall apply *mutatis mutandis* to the delegate when the depositary has contractually transferred its liability in accordance with sections 13.1 and 13.2 above.

Objective reasons for the depositary to contract a discharge of liability

- 13.7 The objective reasons for contracting a discharge pursuant to section 13.1 above shall be:
- (a) limited to precise and concrete circumstances characterising a given activity; and
 - (b) consistent with the depositary's policies and decisions.
- 13.8 The objective reasons shall be established each time the depositary intends to discharge itself of liability.
- 13.9 The depositary shall be deemed to have objective reasons for contracting the discharge of its liability in accordance with section 13.1 when the depositary can demonstrate that it had no other option but to delegate its custody duties to a third party. In particular, this shall be the case where:
- (a) the law of a third country requires that certain financial instruments be held in custody by a local entity and local entities exist that satisfy the delegation criteria laid down in sections 11.1 to 11.4 above; or
 - (b) the AIFM insists on maintaining an investment in a particular jurisdiction despite warnings by the depositary as to the increased risk this presents.

14 Invoked liability

- 14.1 Liability to the investors of the AIF may be invoked directly or indirectly through the AIFM, depending on the legal nature of the relationship between the depositary, the AIFM and the investors.

15. Depositary reporting to the FSC

- 15.1 The depositary must make available to the FSC, on request, all information which it has obtained while performing its duties and that may be necessary for the FSC or the other supervising authorities of the AIF or the AIFM. Where the FSC is not the competent authority of the AIF or the AIFM, the FSC shall share the information received without delay with the competent authorities of the AIF and the AIFM. This will also be the case when the FSC requires information from the competent authorities of the AIF or the AIFM; such competent authorities shall be obliged to share the information with the FSC without delay.



16. Exemption for AIF to appoint a depositary established in another Member State

The FSC, as the competent authority of the home Member State of an AIF or, in a case where the AIF is not regulated, as the competent authority of the home Member State of an AIFM, may allow institutions referred to in section 3.1(a) and established in another Member State to be appointed as a depositary until 22 July 2017.

17. Application of implementing measures

Any measures adopted by the European Commission under Article 21(17) of the AIFMD shall also be applicable.